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Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

INTERNATIONAL RECTIFIER CORPORATION,

Petitioner,

v.

IXYS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit erred in exercising jurisdiction over a civil appeal even though the notice of appeal was not filed until 46 days after entry of the judgment, basing its jurisdiction instead on a routine post-judgment motion asking the district court to stay enforcement of the judgment?

PARTIES TO THE PROCEEDING

Petitioner International Rectifier Corporation ("IR") was the plaintiff in the district court and an appellee or cross-appellant in the proceedings on appeal.

Respondent IXYS Corporation ("Ixys") was the defendant in the district court and appellant in the appeal proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, International Rectifier Corporation has no parent corporation, and no publicly listed company holds more than 10% of IR's stock.

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OPINIONS BELOW

Judgment in the Central District of California was entered September 14, 2006. The district court's order denying Ixys's motion for an extension of time to file its notice of appeal was entered on December 8, 2006. (App.18a-35a.) Ixys abandoned its appeal of this order. On February 11, 2008, the Court of Appeals for the Federal Circuit entered its opinion and judgment reversing the September 14, 2006 judgment. (App. 1a-17a.) That decision was published at *International Rectifier Corp. v. Ixys Corp.*, 515 F.3d 1353 (Fed. Cir. 2008).

JURISDICTION

The Federal Circuit entered its opinion and judgment now sought to be reviewed on February 11, 2008. The Federal Circuit's order denying IR's petition for rehearing *en banc* was issued on April 4, 2008. (App. 36a-37a.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2107 is quoted at Appendix page 38a. The pertinent provisions of Rules 3 and 4 of the Federal Rules of Appellate Procedure are set forth at Appendix pages 39a-43a.

STATEMENT OF THE CASE

This petition lies from the Federal Circuit's wrongful exercise of jurisdiction over Ixys's untimely appeal from an adverse judgment of patent infringement.

IR filed this lawsuit in June 2000, averring that certain of Ixys's specialized transistor products infringe particular claims of three of IR's patents. Jurisdiction was based on 28 U.S.C. §§ 1331 (jurisdiction over claims arising under federal law) and 1338(a) (jurisdiction over claims of patent infringement). In 2001, the district court found as a matter of law that Ixys infringed IR's patents and awarded summary judgment of infringement in favor of IR and against Ixys. At the damages trial in 2002, the jury found that Ixys willfully infringed IR's patents, and judgment was entered awarding damages of approximately $29 million. On appeal, the Federal Circuit construed the claims *de novo*, found that Ixys could not have literally infringed the patents based on the new constructions, reversed the judgment and remanded for a new trial on liability and damages.

On remand, a jury found that Ixys had infringed one of the asserted patents under the doctrine of equivalents and awarded IR damages of $6.241 million for Ixys's past infringement. Judgment, including a permanent injunction against further infringement, was entered on September 14, 2006.

Ixys did not file a notice of appeal during the subsequent 30-day period for doing so. Indeed, Ixys filed no papers during that period except those related to a routine motion asking the district court to stay

enforcement of the judgment, which the district court denied by order entered November 14, 2006. Ixys did not submit a notice of appeal until October 30, 2006 – 46 days after entry of the judgment.

Concurrently with its notice of appeal, Ixys filed a motion under Rule 4(a)(5) of the Federal Rules of Appellate Procedure for an extension of time in which to file its notice of appeal. The district court denied that motion by order entered December 8, 2006. (App. 18a-35a.) In its order, the district court found that Ixys had neither good cause nor excusable neglect entitling Ixys to relief from its failure to file its notice of appeal. Rather, the court found that Ixys's delay in filing its notice "was at least in part strategic rather than merely neglectful." (App. 33a, ¶26.)

Although Ixys timely appealed that denial, it did not challenge that ruling in its opening brief, and the Federal Circuit did not review or discuss the district court's December 8, 2006 order.

After Ixys moved the Federal Circuit for a stay of the permanent injunction, a motions panel, in a January 18, 2007 order denying Ixys's motion in that court to stay enforcement of the judgment, concluded that the Federal Circuit would "likely" have jurisdiction because the relevant regional circuit (the Ninth Circuit) would view Ixys's motion to stay filed in the district court as equivalent to a notice of appeal. In its principal brief, IR demonstrated that the motion panel's interim ruling on jurisdiction was wrong because it contravened the plain language of Appellate Rule 3, Supreme Court authority and the law of the other Circuit Courts of

Appeals, including the Ninth and Tenth Circuits, both of which had refused to construe a motion to stay as a notice of appeal.

In an opinion dated February 11, 2008, the Federal Circuit reversed field on the choice-of-law issue and held that Federal Circuit and not regional circuit law would be applied to the jurisdictional question. Thus unconstrained by contrary Ninth Circuit precedent, the Federal Circuit relied on a single line from *Smith v. Barry*, 502 U.S. 244 (1992), to construe Ixys's motion to stay as a notice of appeal: "If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal." (App. 6a.)

Citing contrary opinions of this Court and the other Circuits, IR petitioned the Federal Circuit for *en banc* review. After ordering Ixys to respond, the Federal Circuit then denied without comment IR's petition by order dated April 4, 2008.

REASONS FOR GRANTING THE PETITION

A fundamental issue, relevant to all circuit courts of appeals, arises when an appellant in a civil case fails to file a timely notice of appeal. In such cases, the rule adopted by the Federal Circuit permits an appellate court to manufacture its own jurisdiction, in derogation of the controlling statutes and rules as well as the decisions of this Court and those of the other circuits. This ruling creates an issue of significance far beyond this case because it directly impacts all civil litigants in federal courts, ensures idiosyncratic determinations of appellate jurisdiction, and repudiates a century's worth of practice and precedent in federal courts.

Applicable statutes and rules condition the exercise of appellate jurisdiction to hear civil appeals on the timely filing of a notice of appeal – a document that puts the district court, the appellate court and the parties on notice that the appellant is invoking the jurisdiction of the appellate court, and specifying the identity of any appellants, the judgment or order that is the subject of the appeal, and the particular appellate court whose jurisdiction is being invoked. While courts may exercise some liberality in construing the sufficiency of such notices to prevent unfairness, particularly to *pro se* prisoners or where liberty is otherwise at stake, this Court's precedents confirm that such liberality cannot excuse the failure to file a timely notice of appeal.

The Federal Circuit's ruling in this case crosses that line. Based on an out-of-context sentence from *Smith v. Barry*, the court of appeals converted Ixys's routine post-judgment motion asking the district court to stay enforcement of the judgment into a notice of appeal based only on the statement in the motion that Ixys intended *in the future* to invoke the appellate jurisdiction of the Federal Circuit. As discussed in Section I below, however, that rationale ignores the fundamental quality of a notice of appeal – it must notify the courts and other parties that the jurisdiction of the appellate court is *then* being invoked, not merely that the party filing the document is unhappy with the judgment and might later take an appeal. This is particularly true of a post-trial motion to the district court, which necessarily invokes the jurisdiction of the district court and not that of the appellate court.

The Federal Circuit's ruling is also inconsistent with this Court's precedents, which dictate that although Rule 3 may be read liberally, an overly broad reading results in non-compliance with the rules and is tantamount to an impermissible time extension for filing a notice of appeal. Although this Court has endorsed the limited practice of construing another document as the functional equivalent of a notice of appeal, the situations where it has done so have been very narrow. For example, the case containing the sentence quoted by the Federal Circuit, *Smith v. Barry*, merely held that a *pro se* prisoner had substantially complied with the applicable rules when he filed a premature notice of appeal followed by an appeal brief within the time for noticing the appeal. Indeed, lower-court cases applying the so called functional-equivalent doctrine have typically done so where a notice of appeal, albeit a defective one, had been filed, or at the very least where the substitute notice purported to invoke (or assumed the earlier invocation of) the appellate court's jurisdiction.

Moreover, as discussed in Section II below, the Federal Circuit also created a split with the Ninth and Tenth Circuits, both of which have held that a motion to stay is not a notice of appeal, and the Ninth and Fifth Circuits, which reject the approach that a counseled party (like Ixys) in a non-*habeas* civil case who could have timely noticed its appeal but failed to do so can be rescued by the functional-equivalent doctrine. The Fifth Circuit cautions that a practice such as the one adopted by the Federal Circuit eviscerates the rules proscribing jurisdiction.

The Federal Circuit's willingness to excuse outright non-compliance with the rules sets a dangerous precedent. First and foremost, its published opinion creates confusion and ambiguity where jurisdictional rules must be clear-cut. It ensures that appellate jurisdiction will be randomly and disparately exercised, in stark contrast to the uniform national law intended by Congress when it enacted a statute of general applicability mandating the timely filing of a notice of appeal. Ironically, the Federal Circuit's generosity – which goes well beyond that previously afforded *pro se* prisoners – benefits exactly the parties who need it the least: counseled patent litigants. Moreover, the Federal Circuit's wide-open standard will permit virtually any post-judgment motion to the district court to retroactively qualify as a notice of appeal whenever (as in most cases) the motion has been filed within 30 days of the judgment. Its effect in practice thus will be to nullify the mandatory and jurisdictional nature of a notice of appeal.

Guidance from this Court is urgently needed to prevent the above, which if left uncorrected will efface the boundaries of appellate jurisdiction. *Certiorari* should be granted so that this Court can clarify its holding in *Smith*, restore the requirement of a meaningful notice of appeal, and ensure nationwide uniformity in the proper interpretation and application of the federal rules and statutes governing appellate jurisdiction. *U.S. v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 230-31 (1958) (granting *certiorari* because of need for uniformity of federal rules "governing the time within which appeals may be taken from judgments of District Courts in actions for money only tried without a jury").

I. The Federal Circuit's Ruling Eviscerates The Statutes And Rules Defining Appellate Jurisdiction And Is Inconsistent With This Court's Decisions.

A. As A Practical Matter, The Federal Circuit's Ruling Nullifies The Applicable Statutes And Rules Governing Notices Of Appeal.

Congress has limited the exercise of appellate jurisdiction in civil cases to those cases where a notice of appeal is filed within 30 days of entry of the judgment to be reviewed, unless the federal government is a party or the district court extends the time based on a showing of excusable neglect or good cause. 28 U.S.C. § 2107. The purpose of a notice of appeal is

> to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose.

Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978). "The filing of a notice of appeal is an event of jurisdictional significance-it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982).

This statutory mandate is implemented by Rules 3 and 4 of the Federal Rules of Appellate Procedure, which together constitute "a single jurisdictional threshold." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988). Rule 3 provides that an appeal may be taken "only by filing a notice of appeal with the district clerk within the time allowed by Rule 4." Fed. R. App. P. 3(a)(1). Rule 4, in turn, provides that the notice of appeal in a civil case "must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1)(A). Non-compliance with these rules deprives the appellate court of jurisdiction. *Bowles v. Russell*, 551 U.S. __, 127 S. Ct. 2360, 2364 (2007), *citing Scarborough v. Pargoud*, 108 U.S. 567, 568 (1883).

As noted above, there is a statutory exception to the 30-day requirement that Ixys sought to take advantage of below – a "district court may . . . extend the time for appeal upon a showing of excusable neglect or good cause." 28 U.S.C. § 2107(c); *see also* Fed. R. App. P. 4(a)(5). In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993), this Court established a four-factor test to guide district court discretion in deciding such motions. Consistent with the *Pioneer* holding, and in accordance with the procedures established by the relevant regional circuit, *Pincay v. Andrews*, 389 F.3d 853, 860 (9th Cir. 2004) (*en banc*), the district court weighed the relevant factors and concluded that Ixys had not established the requisite grounds for an extension of time to notice its appeal. (App. 18a-35a.)

Although Ixys timely appealed that order, it did not challenge the district court's ruling in any of its briefing on appeal, and the Federal Circuit never reviewed the district court's discretionary decision to deny the requested extension. Under the foregoing authorities, that should have resulted in the dismissal of Ixys's appeal for want of jurisdiction.

Yet, the Federal Circuit did not dismiss the appeal, and instead exercised its jurisdiction to reverse the judgment. The Federal Circuit based this exercise of jurisdiction on Ixys's motion for stay filed in the district court, which it treated as a notice of appeal because the Federal Circuit (wrongly) concluded that it contained the three pieces of information specified by Rule 3(c)(1): a specification of the party or party supposedly "taking the appeal" (Fed. R. App. P. 3(c)(1)(A) – in this case the moving party, Ixys); a designation of the judgment "being appealed" from (Fed. R. App. P. 3(c)(1)(B) – in this case the judgment that was the subject of the stay motion); and the name of "the court to which the appeal is taken" (Fed. R. App. P. 3(c)(1)(C) – in this case the Federal Circuit). (App 6a.) To the Federal Circuit, that was the beginning and end of the analysis – if a document filed within 30 days of a judgment contains those three bits of information, then the appellate court has jurisdiction despite the lateness or absence of an actual notice of appeal. (App 6a-7a.)

The Federal Circuit got the requirements exactly backwards. Rule 3(c)(1) states that a "notice of appeal must" contain the specified information, not that any arbitrary document that contains the specified information is necessarily a notice of appeal. To the

contrary, as discussed above, a notice of appeal is exactly that – a document that provides notice to the courts and to the other parties that the jurisdiction of the appellate court is *then* being invoked – not that such jurisdiction might be invoked at some point in the future. *Thomas v. Morton Int'l*, 916 F.2d 39, 40 (1st Cir. 1990) (*per curiam*) (a motion for extension of time in which to notice an appeal "in no way purported to place the court and opposing party on notice that he was at that time appealing. . . . To treat such a request for extra time as the notice itself would be to render the notice requirement meaningless");[1] *Barrett v. U.S.*, 105 F.3d 793, 795-96 (2d Cir. 1997) (a constructive notice of appeal must "accomplish the dual objectives of (1) notifying the court and (2) notifying opposing counsel of the taking of an appeal"), *quoting Van Wyk El Paso Inv., Inc. v. Dollar Rent-A-Car Sys.*, 719 F.2d 806, 807 (5th Cir. 1983) (*per curiam*). Wright & Miller's synthesis of the relevant

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1. Although *Thomas* came before *Smith v. Barry*, many post-*Smith* courts continue to follow this rationale in finding that motions asking the district court for extensions of time in which to perfect an appeal do not qualify as notices of appeal, at least outside of the *pro se* prisoner context. *See, e.g., Isert v. Ford Motor Co.*, 461 F.3d 756, 761 (6th Cir. 2006) (motion for an extension of time not a constructive notice of appeal because it "does not give notice, but conveys only ambivalence, about whether they wish to appeal at all"); *Harris v. Ballard*, 158 F.3d 1164, 1166 (11th Cir. 1998) (motion for extension of time not a constructive notice because it "indicates uncertainty as to whether the party will in fact appeal and compels the conclusion that the notice of appeal is something yet to be filed"), *distinguished by Rinaldo v. Corbett*, 256 F.3d 1276, 1279 (11th Cir. 2001) (construing *pro se* prisoner's motion for time extension as notice of appeal because he "stated unequivocally that he did intend to appeal").

cases also confirms that a substantial equivalent to a notice of appeal must provide notice of a present appeal:

> [I]f a party has failed to abide by the simple requirement of filing a notice of appeal with the clerk, an effective substitute demands some sort of paper or entry on the written record that might reasonably be construed as a notice of appeal and that in fact gives adequate notice to the courts and the other parties as to the appeal from a particular judgment.

16A C. Wright, A. Miller & E. Cooper, Fed. Prac. & Proc. § 3949.6 pp. 86-90 (3d ed. 1999).

Such notice of a *present* appeal was distinctly *not* provided by the post-judgment motion relied on by the Federal Circuit in this case, which sought relief from the district court, did not reflect the invocation or existence of a present appeal, and merely referred to a contemplated *future* appeal. *See U.S. v. Little*, 392 F.3d 671, 681 (4th Cir. 2004) (letter not constructive notice of appeal where "[t]he entire purpose of Little's letter was to request that the *district court* take action") (emphasis in original).

Indeed, the requirement of a *present* appeal – not a possible future one – is inherent in the language of Rule 3(c)(1), which requires the notice to specify the party "taking the appeal" (not, as found sufficient by the Federal Circuit, the party filing a district-court motion and who may later take an appeal); the judgment "being appealed" from (not, as found sufficient by the Federal Circuit, the judgment that would be the subject of a

possible later appeal); and the name of "the court to which the appeal is taken" (not, as found sufficient by the Federal Circuit, the court to which the appeal might later be taken).

It is also noteworthy that the Federal Circuit's rationale has the practical effect of permitting virtually every post-judgment motion to create appellate jurisdiction, for every such motion will identify the party filing it and the judgment contended to be erroneous, and virtually all such motions will also refer to the appropriate appellate court whose decisions are contended to be inconsistent with the judgment. Thus, as a practical matter, the statutory requirement of a notice of appeal shall cease to exist in any civil case where the loser happens to file a post-judgment motion.

For these reasons, the expansive rule advanced by the Federal Circuit is at war with the language of the controlling statutes and rules. Yet none of that language was analyzed by the Federal Circuit, which instead based its far-reaching result on a single out-of-context sentence from *Smith v. Barry*. As discussed below, however, neither *Smith v. Barry* nor any of the cases following it supports the Federal Circuit's ruling.

B. The Federal Circuit's Ruling Is Not Supported By This Court's Ruling In *Smith v. Barry* Or By This Court's Other Decisions.

Smith v. Barry is a relatively recent case in a line of cases where this Court has found appellate jurisdiction based on substantial compliance with Rules 3 and 4. As discussed in more detail below, where the appellant is *pro se* and/or where liberty interests are at stake, appellate courts have exercised jurisdiction following substantial though imperfect compliance due to some technical deficiency in the notice of appeal.

An early decision enunciating this so-called functional-equivalent doctrine notes that it is based on the "liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal." *Coppedge v. U.S.*, 369 U.S. 438, 444 n.5 (1962). In support of that statement, Chief Justice Warren cited numerous opinions in which courts had construed other documents filed by such appellants as notices of appeal. *Id.* In these cases, the appellant filed a premature or otherwise non-compliant notice of appeal, or filed an appeal-related document directly in the appellate court.[2] As such documents invoke the appellate court's jurisdiction (or are at least part of the appellate process), they thus clearly reflect the present "taking" of an appeal.

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2. In one instance cited by the Court, the appellant filed a motion in the district court to waive the appeal filing fee and proceed *in forma pauperis*.

Two years later, the Court applied the functional-equivalent doctrine to a letter to the sentencing court written by a *pro se* prisoner (who was also paraplegic and hospitalized) whom the government prevented from obtaining counsel. *Fallen v. U.S.*, 378 U.S. 139 (1964), *superseded by statute on other grounds as stated in Carlisle v. U.S.*, 517 U.S. 416 (1996). The Court highlighted the circumstances that determined its ruling: that the sentencing judge promised to provide appellate counsel, as required by the rules, but failed to do so; that the prisoner was "whisked away from the place of trial . . . [and] not permitted to have visitors, nor afforded the opportunity to secure another attorney . . . and . . . confined in a hospital both in Jacksonville and in Atlanta"; and that, as soon as he was released from the hospital, he wrote and promptly mailed two letters to the district court asking for both a new trial and an appeal. *Id.* at 142-43. Because the petitioner "did all he could under the circumstances," the Court declined "to read the Rules so rigidly as to bar a determination of his appeal on the merits." *Id.* at 144.

In another early case, the Court applied the functional-equivalent doctrine outside the prisoner context and found the jurisdictional mandate satisfied where the appellant had filed two notices of appeal (one after the judgment and a second after the denial of post-trial motion) as well as interim appellate papers. *Foman v. Davis*, 371 U.S. 178 (1962). Even if (under the then-applicable version of Rule 4) the first notice had been rendered ineffective by the post-judgment motion, the Court reasoned that collectively the documents should have been treated as an effective, albeit technically

flawed, notice of appeal of the underlying judgment as well as of the denial of the post-judgment motion:

> Taking the two notices and the appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of the motions was manifest. . . . It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities.

Id. at 181.

Following these decisions, Appellate Rules 3 and 4 were adopted in 1967. The Advisory Committee noted at the time that although the timely filing of a notice of appeal is jurisdictional and mandatory, and that "compliance with the provisions of these rules is of the utmost importance," certain decisions "which dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules." The cited illustrative decisions all involve prisoners acting without counsel, including *Fallen*, *Coppedge* and its list of cases cited in support of its "liberal view" shown to "indigent and incarcerated defendants." Fed. R. App. P. 3 Advisory Committee Notes 1967 Adoption.

When the Rules were amended in 1979, a line was added to Rule 3(c) to give recognition to the court practice of construing documents as functional equivalents: "An appeal shall not be dismissed for informality of form or title of the notice of appeal." The accompanying Advisory Committee Notes explain that

the rule was amended to distinguish between lapses in form and true jurisdictional impediments to appeal:

> [I]t is important that the right to appeal not be lost by mistakes of mere form. In a number of decided cases it has been held that so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with.

Fed. R. App. P. 3 Advisory Committee Notes 1979 Amendments.

Following these amendments, the Court confirmed *Foman*'s principle that a proper notice of appeal should not be dismissed for "mere technicalities." *Torres*, 487 U.S. at 316. "Thus if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." *Id.* at 316-17. Nevertheless, the *Torres* Court rejected a claim by a plaintiff class member that the notice of appeal encompassed him, even though he had not been named in the notice due to an error by his counsel's secretary. The Court found such an omission to be more than a mere technicality because, by omitting the name of that appellant, the notice of appeal did not contain all the information required by Rule 3(c). *Id.* at 317. In cautioning that liberality cannot be so broad as to "waive the jurisdictional requirements of Rules 3 and 4," the Court held that the exercise of jurisdiction over the unnamed party would do just that and be "equivalent to permitting courts to extend the time for filing a notice of appeal." *Id.* at 316-17.

Four years later, this Court confronted Rule 3 and the functional-equivalent doctrine again when the Court granted *certiorari* on the issue of "whether an appellate brief may serve as the notice of appeal required by Rule 3," a question that then divided the circuit courts. *Smith v. Barry*, 502 U.S. 244, 247 (1992). Acting *pro se*, Smith first filed a premature (and, under then-applicable rules, ineffective) notice of appeal and then, during the 30-day time period for noticing an appeal, Smith filed his informal appeal brief in the court of appeals on the form for such briefs supplied to him by the clerk of that court. *Id.* at 246-47. Even though the brief conveyed notice of a present appeal and contained the information required by Rule 3(c), the Fourth Circuit found that it lacked jurisdiction because Smith acted in response to a briefing order (in what he mistakenly believed was an existing appeal) rather than from an "intent to initiate an appeal." *Smith v. Galley*, 919 F.2d 893, 896 (4th Cir. 1990). The Court dismissed this logic as "dubious, since Smith received the briefing form as a result of filing a notice of appeal, albeit a premature one" and rejected this narrow approach:

> More importantly, the court should not have relied on Smith's reasons for filing the brief. While a notice of appeal must specifically indicate the litigant's intent to seek appellate review, the purpose of this requirement is to ensure that the filing provides sufficient notice to other parties and the courts. Thus, the notice afforded by a document, not the litigant's motivation in filing it, determines the document's sufficiency as a notice of appeal. If a document filed within the time specified

> by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal.

Smith, 502 U.S. at 248-49 (internal cites omitted).

The actual holding, which matched the narrow scope of the issue on which *certiorari* had been granted, simply rejected the categorical exclusion of appeal briefs from the possibility of providing the required notice of appeal: "In this case, we hold that a document intended to serve as an appellate brief may qualify as the notice of appeal required by Rule 3." *Id.* at 245. Thus, *Smith* is consistent with this Court's prior dictates that leniency under the functional-equivalent doctrine applies, in light of all the circumstances, to a *pro se* prisoner (as in *Coppedge*), who took steps to get his appeal underway (as in *Fallen*), and filed a premature notice along with another appellate document (as in *Foman*) – always provided (as in *Torres*) that leniency does not forgive non-compliance with the rules or provide an impermissible extension of time to appeal. *Smith* falls well short of holding that *every* document containing the information specified by Rule 3(c) and filed within the appropriate time limit is a substitute for a notice of appeal regardless of the circumstances of the case. *Smith*'s language that "a document filed within the time specified by Rule 4 gives the notice required by Rule 3 is effective as a notice of appeal" does not dispense with the requirement to file a timely notice of appeal – *i.e.*, a document filed within 30 days of entry of a judgment notifying the court and the opposing party that the jurisdiction of the appellate court is then being invoked and containing the information about that present appeal specified in Rule 3(c).

This same qualification can be discerned in the post-*Smith* amendments to Rule 3. After discussing notices in the context of class action and *pro se* petitioners, the Advisory Committee concluded that "dismissal of an appeal should not occur when it is otherwise clear from the *notice* that the party *intended* to appeal." Fed. R. App. P. 3 Advisory Committee Notes 1993 Amendments (emphasis added). Moreover, the amendments show that the "intent" requirement was not prospective; rather, the objective intent of the document must be to further the appeal in some way, as a notice would do, or a functional equivalent that is part of the appellate process.

The Court's confirmation of this intent is reflected in a post-*Smith* decision, *Becker v. Montgomery*, 532 U.S. 757 (2001), where the appellant had typed but not signed his name on the notice of appeal. Citing *Foman* and *Smith*, the Court observed that "[o]ther opinions of this Court are in full harmony with the view that imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court." *Id.* at 767. This language in *Becker* makes clear that at most the functional-equivalent doctrine applies to a document that presently invokes or presupposes appellate jurisdiction. Significantly, the Court's opinion implied that had Rule 3 required a signature, the defect would have been more than technical and dismissal would have been required. Thus, *Becker* confirms the limits on the leniency principles enunciated in *Smith*.

This strict enforcement of the limits of appellate jurisdiction and confirmation of the import of a timely notice of appeal is also reflected by this Court's recent decision in *Bowles v. Russell*, where the Court abolished the "unique circumstances" doctrine recognized in earlier cases which had excused the failure to file a timely notice of appeal. 127 S. Ct. 2360. Appellant Bowles had not timely filed a notice of appeal (in that case, after the denial of a federal *habeas* petition), so he accordingly sought and obtained from the trial court additional time to do so. *Id.* at 2362. Although Bowles filed within the time frame given to him by the district court, the court of appeals dismissed the appeal for lack of jurisdiction and this Court affirmed. *Id.* at 2362-63. Finding not dispositive the equitable principles emphasized by a strong dissent, the Court held that Bowles' reliance on the order was an "error . . . of jurisdictional magnitude" and that he "cannot rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations." *Id.* at 2366. To drive home the importance of such compliance, the Court observed that it had recently declined to hear the petition of a condemned prisoner before his execution because that first-time petitioner's filing was one day late. *Id.* at 2365 n.4. In so ruling, the Court expressly overruled longstanding precedent showing leniency to tardy appellants.

Although *Bowles* dealt with the timing of the notice of appeal rather than its contents, the point the Court was making is the same one it made in *Coppedge*, *Fallen*, *Foman*, *Torres*, *Smith* and *Becker*: while a court may permit technical deficiencies to be cured when a good-faith effort at compliance falls short, it is entirely inappropriate for a court to distort the meaning of the

jurisdictional requirement in order to transform an outright violation into an act of compliance.

The open-ended ruling of the Federal Circuit, effectively eviscerating the requirement for a notice of appeal whenever a post-judgment motion is filed, is not supported by *Smith v. Barry* or this Court's other decisions.

II. The Federal Circuit's Ruling Creates A Conflict With Rulings In Other Circuits.

In applying this Court's precedents, no federal court of appeals has interpreted *Smith* in the broad manner as did the Federal Circuit, nor has one adopted such a lenient standard for *any* tardy appellant, let alone a counseled litigant in a non-*habeas* civil case. Two Circuits have directly rejected the standard adopted by the Federal Circuit.

The Fifth Circuit explicitly renounced the Federal Circuit's catch-all approach in *Williams v. Chater*, 87 F.3d 702 (5th Cir. 1996). In *Williams*, the appellant was a disability claimant who had properly noticed his appeal of the judgment, but had neglected to file a separate notice of appeal for a post-judgment order denying reconsideration of the appealed judgment. *Id.* at 704. The appellant did file his opening brief attacking the post-judgment order within the time period for filing a notice of appeal, and although the document contained the information required by Rule 3(c) the Fifth Circuit nevertheless held that *Smith* was "inapplicable" because Smith was a *pro se* prisoner who attempted to file a notice of appeal that was "technically deficient"

whereas Williams was a counseled party who "made no attempt to file any notice of appeal from the denial of his requested 60(b) relief." *Id.* at 705. Accordingly, the court refused to construe the appellate brief as a notice of appeal of the post-judgment order because "[e]ven when construed liberally, to conclude on these facts that the requirements of Rule 3(c) have been met would be to essentially eviscerate the rule." *Id.*; *see also Isert v. Ford Motor Co.*, 461 F.3d 756, 763 (6th Cir. 2006) ("Courts can, and should, work overtime to excuse errors of form but they cannot simultaneously excuse errors of form *and* function without assuming authority to waive compliance with the Rules altogether").

The Ninth Circuit, the regional circuit in this case, has also rejected the Federal Circuit's aggressive reading of *Smith*. In *S.M. v. J.K.*, 262 F.3d 914 (9th Cir. 2001), a represented litigant had failed to timely notice her cross-appeal and asked that her civil appeals docketing statement be deemed the equivalent of the required notice. *Id.* at 922. Even though this failure did not constitute a jurisdictional barrier because it related to a cross-appeal, the Ninth Circuit refused to exercise jurisdiction because the cross-appellant "knew within the time period for filing her notice of cross-appeal that she intended to appeal" and "could have filed her notice of cross-appeal on time." *Id.* at 923. The court held that *Smith* did not require a different result and that "[t]here is no reason to allow Plaintiff to bring her cross-appeal without filing the requisite notice." *Id.* at 923.

In basing its jurisdiction on Ixys's motion to stay filed in the district court, the Federal Circuit also directly contradicted rulings in the Ninth and Tenth Circuits that

a motion to stay is not the functional equivalent of a notice of appeal. *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1232-33 (9th Cir. 1989);[3] *Century Laminating, Ltd. v. Montgomery*, 595 F.2d 563, 568-69 (10th Cir. 1979).

In *Century Laminating*, the defendant had filed a notice of appeal within 30 days of the final judgment, but motions for judgment n.o.v. and for an injunction were still pending, which rendered the notice premature and ineffective under the rule in force at that time. 595 F.2d at 568. In denying defendant's argument that the court "look beyond the technical requirements of Rule 4" where the plaintiff was not prejudiced, the court of appeals held that all jurisdictional requirements are technical, but that does not render them unimportant:

> Litigant appellees as well as appellants have a right to rely on conformity by their adversaries with applicable statutes and rules, especially when compliance with the rule is a jurisdictional prerequisite to the appeal itself. Expense, inconvenience, and what a litigant may believe to be injustice, are unavoidable consequences of failure to abide by a statute or rule, e.g., a

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3. In 1949, the Ninth Circuit affirmed the district court's construction of a motion to stay execution so a supersedeas bond could be posted as a notice of appeal. *Cutting v. Bullerdick*, 178 F.2d 774 (9th Cir. 1949). At that time, however, the defect was not jurisdictional: "At this time the practice for Alaska was in doubt, 2107 not providing for the contents of a notice of appeal and Federal Rules of Civil Procedure, rule 73, 28 U.S.C.A., not applying to Alaska." *Id.* at 776. In any event, the Ninth Circuit later distinguished *Cutting* as "not dispositive." *Cel-A-Pak v. Cal. Agric. Labor Relations Bd.*, 680 F.2d 664, 667 (9th Cir. 1982) (*per curiam*).

> statute of limitation. There is some virtue in finality in an end to litigation.

Id.

The court then observed that the premature filing did not render the defendant without options, since he still could have filed a timely notice, and rejected his request to construe his motion to stay as a timely notice of appeal:

> The motion to stay was, by its own recitations, filed under the provisions of Rule 62(c), Fed. R. Civ. P., which has reference to an appeal from a final judgment granting or denying an injunction. Both Civil Rule 62(c) and Appellate Rule 8 presuppose the existence of a valid appeal. Obviously Montgomery, when he prepared and filed his motion for an order staying the injunction, believed that he had effectively appealed from the judgment and did not then intend his motion to serve as a notice of appeal, and we do not so construe it.

Id. at 568-69.

In *Hollywood*, the Ninth Circuit held that a motion to stay cannot be a constructive notice of appeal when the party is represented by an attorney "absent extraordinary circumstances." 886 F.2d at 1232. The circumstances in *Hollywood*, like those here, were not extraordinary – a represented party in a civil case simply failed to timely file a notice of appeal. *Id.* at 1229. Like the majority of appellants seeking refuge in the

functional-equivalent doctrine (but not like Ixys), the *Hollywood* appellant had filed a notice of appeal, not realizing that it was premature and therefore ineffective. *Id.* Although sympathetic to her plight, the Ninth Circuit followed its prior holding in *Munden v. Ultra-Alaska Assocs.*, 849 F.2d 383, 387-88 (9th Cir. 1988), that "[w]e will not extend any leniency that is not demanded by [our] cases to one where the party is represented by an attorney." *Munden* in turn relied on *Cel-A-Pak v. Cal. Agric. Labor Relations Bd.*, 680 F.2d 664, 667 (9th Cir. 1982) (*per curiam*), in which the Ninth Circuit refused to treat a motion for injunction pending appeal as a constructive notice of appeal:

> Since appellant is represented by counsel and neither life nor liberty is at stake, solicitude for unwary pro se and criminal litigants, a factor which often warrants exercise of the court's discretion to tolerate informalities, is not applicable to this case.

Cel-A-Pak, 680 F.2d at 667 (internal cites omitted).

This ruling reaffirmed a long-standing rule in the Ninth Circuit that relief of the kind extended to a *pro se* party would not be extended to represented parties. *Allah v. Superior Court*, 871 F.2d 887, 889 (9th Cir. 1989). This still represents the law in the Ninth Circuit. *See, e.g., Estrada v. Scribner*, 512 F.3d 1227, 1236 (9th Cir. 2008) ("liberally" construing inmate's motion for appellate counsel as a notice of appeal because "he is *pro se*"); *S.M.*, 262 F.3d at 922. Other courts of appeals are similarly reluctant to extend leniency outside the *pro se* context unless life or liberty is at stake. *See, e.g.*,

Sueiro Vázquez v. Torregrosa de la Rosa, 494 F.3d 227, 233 n.6 (1st Cir. 2007) ("defendants are public officials, and their reliance on pro se cases does not advance their cause"); *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1231 (11th Cir. 2007) ("a *pro se* appellate pleading filed within the time limits governing notices of appeal may be treated as one if it contains all of the elements of a notice of appeal"); *Arrington v. U.S.*, 473 F.3d 329, 334 (D.C. Cir. 2006) (two notices of appeal by *pro se* litigant); *Little*, 392 F.3d at 681 (liberal construction applies "especially" to *pro se* filings); *Rodgers v. Wyoming Attorney Gen.*, 205 F.3d 1201, 1205 (10th Cir. 2000) (extending liberality to "counseled habeas petitioners"), *overruled on other grounds by Slack v. McDaniel*, 529 U.S. 473 (2000); *Barrett*, 105 F.3d at 795 ("we take a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal") (internal quotes omitted); *Thomas*, 916 F.2d at 40 ("The history behind this proviso indicates that courts have, at times, interpreted the formal requirements of a notice to appeal liberally, especially in cases of uncounseled persons like pro se prisoners, where letters evidencing a desire to appeal have been accepted as timely, informal notices of appeal"); *McMillan v. Barksdale*, 823 F.2d 981, 983 (6th Cir. 1987).

Prior to the case at hand, the Federal Circuit itself acknowledged that a more lenient standard applied to *pro se* appellants such as a *pro se* injured veteran. *Durr v. Nicholson*, 400 F.3d 1375, 1380 (Fed. Cir. 2005) ("The adequacy of a notice of appeal must be determined with two background interpretive principles in mind. The first principle is that notices of appeal are to be liberally construed. . . . The second background principle is that

pro se pleadings are to be liberally construed") (cites omitted). But with its present ruling, the Federal Circuit went against its own law, that of its sister Circuits,[4] and of this Court's own precedents. If allowed to stand, the Federal Circuit's rationale will permit circuit courts of appeals to manufacture their own jurisdiction in virtually all civil cases where a post-judgment motion is filed.

III. Review Is Needed To Clarify *Smith v. Barry* And Prevent The Erosion Of The Bounds Of Appellate Jurisdiction

"Jurisdictional treatment of statutory time limits makes good sense." *Bowles*, 127 S. Ct. at 2365. Under the applicable rules and this Court's precedents, courts may accept jurisdiction based on notices of appeal or similar documents that suffer from some defect of form but provide the required notice to the court and the parties that appellate jurisdiction is being invoked. Typically, a court supplements a deficient notice of appeal with information provided in a separate, timely-filed document. *See, e.g., Arrington*, 473 F.3d at 334. Less common is where another document is allowed to substitute for a notice of appeal entirely. *See, e.g., Rodgers*, 205 F.3d at 1206 (habeas petitioner's certificate

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4. Although no court of appeals has extended *Smith* as far as did the Federal Circuit, a smattering of cases strain to reach the merits despite the lack of a timely notice of appeal. *E.g., Haugen v. Nassau County Dep't of Soc. Servs.*, 171 F.3d 136, 138 (2d Cir. 1999) (construing as notice of appeal government's letter to district court asking for time extension to appeal; on the merits, the judgment was affirmed in a single paragraph without analysis). Such cases merely underscore the need for this Court to set clear boundaries on the functional-equivalent doctrine.

of probable cause construed as notice of appeal). Properly applied, the functional-equivalent doctrine exists in two situations: (1) so that mere technicalities do not bar an appeal where an otherwise proper notice of appeal has been filed (as in *Foman* and *Becker*); and (2) where a litigant, usually a *pro se* prisoner, who mistakenly thinks he has already invoked appellate jurisdiction files another document that satisfies the requirements of Rules 3 and 4 (as in *Smith*).[5] The doctrine also serves to assist appellants who are genuinely confused about what to appeal, such as whether an order is an interim ruling or is instead final and appealable. *See, e.g., Barrett*, 105 F.3d at 795. A routine motion filed by a counseled party to stay an identified final judgment meets none of these qualifications.

Had this appeal been before the Fifth, Ninth or Tenth Circuits, those appellate courts would have dismissed it because those jurisdictions do not apply the functional-equivalent doctrine to create a *de facto* notice of appeal out of a post-judgment motion seeking a stay from the district court filed by a counseled litigant who knows exactly what needs to be appealed but delays for strategic reasons filing the required notice. This Court should grant *certiorari* to resolve the clear split in the Circuits.

This split is particularly important because it affects the core of appellate jurisdiction, which by statute and

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5. This concern was largely addressed by the 1991 amendments to Rule 4 that eliminated most situations that had resulted in premature notices of appeal. These amendments greatly reduced the need for the functional-equivalent doctrine.

rule should be uniform in all of the federal circuit courts of appeals. Appellate courts need "bright-line rules in this area, rules that can be easily applied at the early stages of a case to determine with certainty whether our jurisdiction has been properly invoked." *Faysound Ltd. v. Falcon Jet Corp.*, 940 F.2d 339, 343 (8th Cir. 1991). The orderly administration of justice requires that the bounds of such jurisdiction be clearly delineated, not plagued by confusion and uncertainty. Although enforcement of the rules may sometimes have harsh results, amendment of the rules may only be done by this Court or by Congress. This case presents an ideal opportunity to restore the integrity of appellate jurisdiction and to bring much needed clarity as to how far the functional-equivalent doctrine extends, if at all, to rescue a party who failed to file a timely notice of appeal.

CONCLUSION

IR respectfully urges Court to grant the present petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED FEBRUARY 11, 2008

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2007-1063, -1141, -1165

INTERNATIONAL RECTIFIER CORPORATION,

Plaintiff-Cross Appellant,

v.

IXYS CORPORATION,

Defendant-Appellant.

Appeals from the United States District Court for the Central District of California in case no. 00-CV-6756, Judge Manuel L. Real.

DECIDED: February 11, 2008

Before LINN, DYK, and PROST, *Circuit Judges.*

LINN, *Circuit Judge.*

This patent case comes to us on appeal for a second time. Following our vacatur-in-part and reversal-in-part of a summary judgment of infringement, the district court held a jury trial. IXYS Corporation ("IXYS") now

appeals from the resulting final judgment of infringement. International Rectifier Corporation ("IR") conditionally cross-appeals, asserting that the district court erred in its jury instructions. Because the judgment of infringement as to each asserted claim is foreclosed either by the combination of our mandate in the prior appeal and the jury verdict or by prosecution history estoppel, we reverse. We dismiss the cross-appeal as moot because the purported error in jury instructions does not affect the final judgment of non-infringement that our decision today requires.

I. BACKGROUND

A detailed description of the technologies and patent claims at issue may be found in our prior opinion in this case, *International Rectifier Corp. v. IXYS Corp.*, 361 F.3d 1363 (Fed. Cir. 2004) ("*IR I*"). To summarize briefly, IR asserted against IXYS various claims of three patents, U.S. Patent Nos. 4,959,699 ("the '699 patent"), 5,008,725 ("the '725 patent"), and 5,130,767 ("the '767 patent"). All three patents disclose metal-oxide-semiconductor field effect transistors (MOSFETs). IXYS's accused devices are MOSFETs and insulated gate bipolar transistors (IGBTs). These transistors are manufactured, in part, by doping the surface of a silicon wafer with a pattern of impurities so as to create multiple regions with different electrical properties.

As in the prior appeal, there are three claim terms at issue, each of which relates to the shape and configuration of these regions. One set of claims, found

only in the '699 patent, requires that the semiconductor wafer include a "lightly doped" region that is "*adjoining*" a "region of opposite conductivity type." *E.g.*, '699 patent, claim 19 (emphasis added). A second set of claims, with substantially similar claim language across all three patents, requires both a "first base region" of "*polygonal*" shape and a "first source region" "having the shape of an *annular* ring." *E.g.*, '699 patent, claim 1 (emphases added). *See generally IR I*, 361 F.3d at 1367 (quoting claim language in full).

The prior appeal was taken from a set of summary judgment opinions in which the district court held that IXYS's devices infringed all three claim limitations. We articulated revised interpretations of each term. *See id.* at 1369-74. As to the claims requiring "adjoining" regions, we held that "there can be no infringement," and we reversed-in-part and remanded "with instructions to enter a judgment of non-infringement of these claims in favor of IXYS." *Id.* at 1375. As to the remaining disputed claims, we held that there were disputed issues of material fact regarding both the terms "polygonal" and "annular" under the proper claim interpretations, and so we vacated-in-part and remanded for further proceedings. *Id.*

On remand, the district court concluded that our mandate with respect to the term "adjoining" pertained only to literal infringement, and that it was free to consider infringement under the doctrine of equivalents. The issue was tried to a jury, and the jury found that the accused devices infringe the "adjoining" claims by equivalents.

Appendix A

The district court also submitted to a jury the infringement issues regarding the remaining claims, with one exception. The district court concluded that IXYS had admitted that its accused devices possessed annular source regions as claimed in the '699 patent because, in its Memorandum of Contentions of Fact and Law, filed in April 2001, and in its amended Memorandum of November 11, 2001, IXYS did not list the "annular" limitation as a disputed claim term in that patent. This omission, the court held, constituted an admission under C.D. Cal. Local Rule 16-3.1 (formerly Local Rule 9-5) that survived our mandate in *IR I*. The jury was therefore allowed to consider whether the accused devices possessed annular sources only with respect to the claims of the '725 and '767 patents.

The jury considered infringement of the "polygonal" limitation—which, as mentioned, is found in the same set of claims—with respect to all three patents. The jury found that IXYS's accused devices possessed base regions that were insubstantially different from the recited "polygonal" regions and therefore met that limitation under the doctrine of equivalents. The jury found, however, that the IXYS devices did not possess any "annular" source regions. Accordingly, the district court entered a judgment of non-infringement as to the '725 and '767 patents, consistent with the jury verdict, but a judgment of infringement, with concomitant money damages and permanent injunctive relief, as to the '699 patent.

On appeal, IXYS contends that the district court erred with respect to all three claim limitations. First, it contends that it is inconsistent with our mandate in *IR I* for the court to have considered infringement by equivalents of the "adjoining" claims; in the alternative, it argues that prosecution history estoppel acts as a bar to the finding of infringement. Second, it challenges the district court's decision that IXYS had admitted that its devices possess annular source regions as claimed in the '699 patent; it argues that our prior mandate compelled the district court to treat the "annular" limitation the same way in all three patents. Third, it challenges the district court's decision to admit into evidence scanning capacitance microscopy (SCM) images that purported to show that IXYS's base regions were polygonal. Undisputed expert testimony, IXYS argues, demonstrates that such images are unreliable. Finally, it argues that the district court erred in failing to instruct the jury explicitly that "polygonal" regions may not have rounded corners. In response, IR argues on cross-appeal, conditionally on a decision not to affirm, that the district court erred in failing to instruct the jury that "polygonal" regions *may* have rounded corners.

II. JURISDICTION

Before we turn to the merits, we must first consider a threshold question of our own appellate jurisdiction. *See Thompson v. Microsoft Corp.*, 471 F.3d 1288, 1291 (Fed. Cir. 2006). "Whether this court has jurisdiction over an appeal taken from a district court decision is a

question of law which we address in the first instance." *Pause Tech. LLC v. TiVo Inc.*, 401 F.3d 1290, 1292 (Fed. Cir. 2005). We apply our own law, not that of the regional circuit, to resolve this question. *Id.*

It is undisputed that IXYS failed to timely file a document styled as a notice of appeal. However, it is also undisputed that within the thirty-day time period for filing a notice of appeal specified by Fed. R. App. P. 4(a)(1)(A), IXYS filed with the district court a motion to stay the permanent injunction pending appeal. Our jurisdiction thus depends on whether this document qualifies as a notice of appeal.

We conclude that it so qualifies. In *Smith v. Barry*, the Supreme Court held that "[i]f a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal." 502 U.S. 244, 248-49 (1992). Under Rule 3, an adequate notice must meet three requirements. It must "(A) specify the party or parties taking the appeal . . .; (B) designate the judgment, order, or part thereof being appealed; and (C) name the court to which the appeal is taken." Fed. R. App. P. 3(c)(1). IXYS's motion to stay sets forth all three pieces of information: *"[(A)] [D]efendant IXYS Corporation ('IXYS')* will, and hereby does, move the Court for an order staying the execution of *[(B)] its September 14, 2006, Final Judgment and enforcement of the permanent injunction entered on the same date* pending resolution of IXYS's appeal to the *[(C)] Federal Circuit Court of Appeals."* Mot. to Stay, *Intl Rectifier Corp. v. IXYS Corp.*, No. 00-CV-6756 (C.D.

Cal. Sept. 28, 2006) (Dckt. No. 720) (emphases added). Under *Smith*, both IR and the district court were therefore on notice of IXYS's intent to appeal. We thus construe the motion as a notice of appeal.

Acting through a motions panel, we tentatively came to the same conclusion in our order of January 18, 2007, denying IXYS's stay pending appeal. IR responds, however, that since that time, the Supreme Court's decision in *Bowles v. Russell* undermines our holding and cabins the leniency required by *Smith*. In *Bowles*, the Supreme Court emphasized the jurisdictional nature of notices of appeal and held that the jurisdictional rules lack equitable exceptions. 127 S. Ct. 2360 (2007). However, *Bowles* concerned the timing requirements of Rule 4 rather than the form requirements of Rule 3. *Id.* at 2362. The petitioner in *Bowles* had sought and been granted an extension of time to file a notice of appeal from an order denying his petition for habeas corpus relief. *Id.* Because the district court's order incorrectly set a deadline beyond the fourteen-day window authorized by the relevant statute, Bowles filed his notice of appeal—which undisputedly complied with the requirements of Rule 3, as well as with the deadline purportedly set by the district court—two days later than was authorized by statute. *Id.* The Supreme Court upheld the court of appeals' dismissal of his appeal for lack of subject-matter jurisdiction. *Id.* at 2367. This strict application of Rule 4 has no bearing on the issue before us today. As mentioned, IXYS's motion for a stay was undisputedly filed within the time limit for a notice of appeal. IXYS does not seek an equitable exception to

a requirement of the rules. Rather, the only question is whether its motion to stay meets the requirements to *be* a notice of appeal, an inquiry dependent on *Smith* and the language of Rule 3, not *Bowles* or Rule 4. It does.

Accordingly, we have jurisdiction, and we proceed to the merits.

III. ANALYSIS

A. "Adjoining" Claims

IXYS contends that the district court overstepped its authority under our mandate in *IR I* when it conducted a jury trial as to infringement under the doctrine of equivalents of the claims containing the "adjoining" limitation, i.e., independent claim 19 and dependent claims 22, 24, and 27 of the '699 patent. In the alternative, it argues that IR is foreclosed by prosecution history estoppel from resorting to the doctrine of equivalents. Because the latter argument is squarely presented for the first time and its resolution may affect future cases, we conclude that the most prudent course of action is to decide the case on this basis. In so doing, we expressly decline to decide the scope of our prior mandate with respect to the doctrine of equivalents.

"[P]rosecution history estoppel limits the broad application of the doctrine of equivalents by barring an equivalents argument for subject matter relinquished

when a patent claim is narrowed during prosecution." *Conoco, Inc. v. Energy & Envtl. Intl, L.C.*, 460 F.3d 1349, 1363 (Fed. Cir. 2006). "[W]e review issues relating to the application of prosecution history estoppel *de novo*." *Id.* at 1357.

During the prosecution of the '699 patent, IXYS argues, IR added the "adjoining" limitation in order to overcome rejections under 35 U.S.C. § 112, paras. 1-2. IXYS argues that the examiner rejected claim 43 (which later issued as claim 19) because the applicants claimed, but failed to disclose, an IGBT mode of operation for the device. The addition of an "adjoining" limitation, in IXYS's view, limits the claimed structure to one that can operate as a MOSFET, and prosecution history estoppel therefore applies to prevent claim 19 and its dependent claims from reaching IGBTs under the doctrine of equivalents.*

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* The relevant text of the claim, before and after amendment, is as follows, with ~~deletions~~ and *additions* indicated:

> . . . ~~a drain conductive region remote from said common region and separated therefrom by said relatively lightly doped major body portion;~~ said wafer uncluding a further region of opposite conductivity type adjoining said lightly doped major body portion; and an electrode coupled to said further region ~~having a support body for supporting said lightly doped major body portion; said support body beig of said opposite conductivity type; and a conductive electrode formed on the surfact of said~~

(Cont'd)

IR makes two arguments in response. First, it asserts that prosecution history estoppel does not apply to its addition of the term "adjoining" because the resulting change in claim language was broadening, not narrowing. The claims, IR argues, are directed to structure rather than function, and the "adjoining" limitation simply clarified what structure was claimed. Second, IR argues that prosecution history estoppel does not apply because the amendment in question is only tangentially related to the asserted equivalent. *See Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 740 (2002) ("There are some cases . . . where the amendment cannot reasonably be viewed as surrendering a particular equivalent. . . . [T]he rationale underlying the amendment may bear no more than a tangential relation to the equivalent in question.").

We agree with IXYS that these arguments fail. As to IR's first argument, IR is correct that the amendment broadened the claim in certain respects—for instance, it eliminated the requirement that the "conductive electrode" at the bottom of the wafer be "coupled" to the drain conductive region, a requirement that the examiner described as "unsupported by neither [sic] the technology nor the specification." At the same time,

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(Cont'd)

~~support body disposed opposite to said lightly doped major body portion; said conductive electrode coupled to said drain conductive region~~.

however, IR chose to introduce the term "adjoining." This term excludes structures that might have been covered by the original claim language, because the "support body" of the old claim—apparently the "further region of opposite conductivity type" of the amended claim—was only required to "support[] said lightly doped major body portion," not necessarily to touch it. The amendment therefore narrowed the scope of the claim, at least with respect to the addition of the term "adjoining." Under such circumstances, IR cannot argue that the amendment was broadening merely because it eliminated some claim limitations.

As to IR's second argument, we disagree with IR that the purpose of the amendment was tangential to the asserted equivalent. It is true that the reason given by the examiner for the rejection was that not all of the limitations in the original claim 43 were supported by the specification, and that IR overcame the rejection by amending the claim to contain only the structural limitations disclosed in the text of the specification and the drawing that became '699 patent figure 8. In this regard, IR is correct that the claim is not necessarily limited to a particular mode of operation, but rather covers a particular structure that, in practice, may or may not function in unexpected ways. However, IR's decision to claim that structure using the limiting term "adjoining," whether or not *required* to overcome the rejection, cannot be described as only tangentially related to the equivalency of a structure with non-adjoining regions. With the amended language, IR recited precisely the structure it disclosed, and thereby

overcame the examiner's § 112 rejection. *See Schwarz Pharma, Inc. v. Paddock Labs., Inc.*, 504 F.3d 1371, 1377 (Fed. Cir. 2007) ("The fact that the inventors may have thought after the fact that they could have relied on other distinctions in order to defend their claims is irrelevant and speculative . . . .").

Accordingly, we hold that prosecution history estoppel bars IR from asserting infringement of the "adjoining" limitation under the doctrine of equivalents, and we reverse the district court's entry of judgment as to the "adjoining" claims.

B. "Annular" and "Polygonal" Claims

The remaining claims on appeal also present issues of the interpretation of our mandate. As mentioned above, IR argued to the district court on remand, and reiterates on appeal, that IXYS is precluded from contesting the presence of annular source regions in its accused devices because it failed to contest that claim limitation in the submissions required under the Central District of California's Local Rules. Indeed, IR describes IXYS's conduct with regard to this claim limitation as "non-compliance" with the rules, and implies that the district court's decision to enter judgment against IXYS on this issue amounts to a discretionary sanction.

We disagree with IR because it raised, and we rejected, the same issue during the last appeal. "[O]nce a case has been decided on appeal, the rule adopted is to be applied, right or wrong, absent exceptional

circumstances, in the disposition of the lawsuit." *Gindes v. United States*, 740 F.2d 947, 949 (Fed. Cir. 1984) (quoting *Schwartz v. NMS Indus., Inc.*, 575 F.2d 553, 554 (5th Cir. 1978)). In its brief as appellee in *IR I*, IR specifically raised, as an alternative basis for affirmance, the argument it reiterates today that IXYS had failed to contest the presence of "annular" source regions with respect to the '699 patent. Br. for Appellee IR at 25-26, *IR I*, 361 F.3d 1363 (Nos. 02-1414, 02-1554) (filed Nov. 27, 2002). IXYS responded by describing this technical argument as "sophistry," because it was undisputed that the term "annular" has the same meaning in all three patents. Repl. Br. for Appellant IXYS at 12 n.14, *IR I*, 361 F.3d 1363 (Nos. 02-1414, 02-1554) (filed Dec. 16, 2002).

In *IR I*, we explicitly vacated and remanded as to the "annular" limitation found in all three patents, including the '699 claims that IXYS allegedly failed to contest. *IR I*, 361 F.3d at 1375 ("Because factual issues exist as to whether IXYS's devices include the 'polygonal' and 'annular' limitations of the claims, as properly construed, we vacate-in-part the district court's grant of partial summary judgment of infringement in favor of IR that IXYS's devices infringe claims 1, 7–8, 20, 23, 25–26, and 28–29 of the '699 patent; . . . and remand the same for consideration consistent with this opinion."). In so doing, although we did not discuss the issue explicitly, we necessarily rejected all of IR's procedural arguments as to why the "annular" limitation should be treated differently in the three patents-in-suit. *See Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1478 (Fed. Cir. 1998) ("[I]n

some cases issues not explicitly addressed by an appellate court may nonetheless be decided by necessary implication."). IR presents no argument as to why we should find exceptional circumstances and revisit this issue.

Accordingly, we conclude that our mandate in *IR I* required the district court to treat the "annular" limitation the same way as to the '699, '725, and '767 patents. The jury verdict of non-infringement as to the "annular" limitation of the '725 and '767 patents carries over to the corresponding limitation in the asserted claims of the '699 patent and compels a judgment of non-infringement of that patent, just as of the other two.

C. Other Issues

The terms "annular" and "polygonal" are found in the same set of claims. Thus, the above discussion in Part III.B compels a judgment of non-infringement with respect to all claims not already disposed of by Part III.A, *supra*. We therefore need not reach IXYS's arguments regarding evidentiary rulings or jury instructions that might alter the jury finding that the accused products meet the "polygonal" limitation. Similarly, IR's arguments on cross-appeal pertain only to the jury instructions respecting the "polygonal" limitation and are moot.

IV. CONCLUSION

Because prosecution history estoppel precludes consideration of infringement by equivalents of the asserted claims containing the term "adjoining," and because the combination of our mandate in *IR I* and the jury verdict finding non-infringement as to the "annular" limitation compels a judgment of non-infringement as to the remaining asserted claims, we reverse. The damages award and permanent injunction are vacated. IXYS is entitled to entry of final judgment in its favor as to all claims. There shall be no further proceedings in this case regarding any questions of infringement, either literally or under the doctrine of equivalents.

2007-1063, -1141: *REVERSED;* 2007-1165: *DISMISSED*

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED FEBRUARY 11, 2008

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2007-1063, -1141, -1165

INTERNATIONAL RECTIFIER CORPORATION,

Plaintiff-Cross Appellant,

v.

IXYS CORPORATION,

Defendant-Appellant.

JUDGMENT

ON APPEAL from the	United States District Court for the Central District of California
in CASE NO(S).	00-CV-6756

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

2007-1063, -1141: REVERSED;
2007-1165: DISMISSED

Appendix B

ENTERED BY ORDER OF
THE COURT

s/ Jan Horbaly/S.W.
Jan Horbaly, Clerk

DATED FEB 11 2008

ISSUED AS A MANDATE: APR 11 2008

APPENDIX C — ORDER DENYING DEFENDANT IXYS CORPORATION'S "MOTION TO EXTEND TIME TO APPEAL" OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED DECEMBER 6, 2006

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV-00-6756-R

INTERNATIONAL RECTIFIER CORPORATION,

PLAINTIFF,

v.

IXYS CORPORATION,

DEFENDANT.

AND RELATED COUNTERCLAIMS.

Date: November 27, 2006
Time: 10:00 a.m.
The Honorable Manuel L. Real

ORDER DENYING DEFENDANT IXYS CORPORATION'S "MOTION TO EXTEND TIME TO APPEAL"

The "Motion To Extend Time To Appeal" of defendant IXYS Corporation ("IXYS") came on regularly for hearing. Each party was represented by

its counsel of record. The Court, having read and considered the papers filed in support of and in opposition to the motion, as having considered the arguments of counsel, makes the following findings and rulings:

1. A jury found that IXYS has been infringing U.S. Patent No. 4,959,699 and this Court accordingly entered a Final Judgment on September 14, 2006 against IXYS and in favor of plaintiff International Rectifier Corporation ("IR"). IXYS did not timely notice its appeal from the Final Judgment and in its Motion To Extend Time To Appeal requested an extension of time in which to so. For the reasons outlined below, this Court denies IXYS's motion.

2. Pursuant to F.R. App. P. 4(a), a party has 30 days in which to appeal a judgment. The entry of Final Judgment on September 14, 2006 commenced the 30 day time period in this action. Because the 30th day fell on a Saturday (October 14), IXYS had until the following Monday, October 16, 2006, to notice its appeal. IXYS did not file its Notice of Appeal until October 30, 2006, however, and did not file a "Corrected" Notice of Appeal until November 1, 2006 – respectively, 46 and 48 days after the entry of the Final Judgment.

3. IXYS concedes that its Notice of Appeal was late and requests an extension under F.R. App. P. 4(a)(5). Under this rule, the district court may grant a request for an extension of time if (1) the request is made within the 30 days after the expiration date and (2) if the moving party establishes good cause for the extension

or that its failure to timely file resulted from excusable neglect. IXYS filed its motion on October 30, 2006, 14 days after the appeal deadline, and thus its request for an extension was within the time period prescribed by Rule 4(a)(5).

4. Although IXYS did not move for an extension on a basis of "good cause," IXYS's proposed order submitted with its motion contained such a reference. Good cause applies where there is no fault — excusable or otherwise — and where the need for an extension is beyond the control of the movant. Fed. R. App. P. 4(a)(5), Advisory Committee's Note (2002). IXYS admits fault, however, and hence does not qualify for an extension based on good cause. As the basis for its motion, therefore, IXYS argues that its failure to timely notice its appeal was due to excusable neglect.

5. Preliminarily, this Court notes that there is a choice of law issue. Even though this is a patent case, IXYS contends that Ninth Circuit rather than Federal Circuit law applies. Although there does not appear to be any published Federal Circuit opinion on point, motions under Rule 4(a)(5) do not raise issues unique to patent law so the Federal Circuit would apply regional circuit law to the issues raised by IXYS's motion. *See Lab. Corp. of Am. Holdings v. Chiron Corp.*, 384 F.3d 1326, 1330 (Fed. Cir. 2004); *Flex-Foot, Inc. v. CRP, Inc.*, 238 F.3d 1362, 1365 (Fed. Cir. 2001). Moreover, although IXYS asks this Court to disregard the law of the other circuits, IXYS itself cites to cases from the First, Second, Sixth, Seventh and Eighth Circuits. (Reply, p.

4.) The Court will therefore rely on Supreme Court and Ninth Circuit precedent, as well as opinions from other circuits that are consistent with those precedents.

6. IXYS further argues that this Court should disregard all law prior to 1993, when the Supreme Court decided *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship,* 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993). IXYS itself, however, cites many pre-*Pioneer* cases. (*E.g.*, Motion, pp. 2 n.l, 3 n.3; Reply, p. 3.) While such earlier cases may be of limited value, they can nevertheless be instructive as to the circumstances where courts have found excusable neglect. *See Davila-Alvarez v. Escuela De Medicina Universidad Central Del Caribe,* 257 F.3d 58, 64 (1st Cir. 2001); 20 Moore's Federal Practice (3rd Ed.) § 304.14[2][a], p. 304-51.

7. Prior to 1993, the standard for excusable neglect had been a strict one, providing relief only under extraordinary circumstances where injustice would otherwise result. *See, e.g., Alaska Limestone Corp. v. Hodel,* 799 F.2d 1409, 1411 (9th Cir. 1986) *(per curiam).* Under this standard, an attorney's inadvertence or mistake, including one attributable to office staff, was as matter of law not excusable neglect. *Id.* In 1993, however, the Supreme Court ruled in *Pioneer,* a case involving the excusable neglect standard of Bankruptcy Rule 9006(b)(1), that courts should avoid *per se* rules and apply a more flexible approach in determining excusable neglect. *Pioneer,* 507 U.S. at 395, 113 S. Ct. at 1498. While holding that excusable neglect was "a somewhat 'elastic concept,'" the Supreme Court

expressly noted that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." *Pioneer*, 507 U.S. at 392, 113 S. Ct. at 1496.

8. In the context of providing relief under Rule 4(a)(5) for late-filed notices of appeal, the Ninth Circuit has determined that "under *Pioneer*, the correct approach is to avoid any per se rule," including any "rigid legal rule against late filings attributable to any particular type of negligence." *Pincay v. Andrews*, 389 F.3d 853, 860 (9th Cir. 2004) *(en banc)*. Moreover, "the decision whether to grant or deny an extension of time to file a notice of appeal should be entrusted to the discretion of the district court." *Id.* at 859. Some other Circuits, however, have interpreted *Pioneer* as not barring *per se* rules and accordingly do not permit District Courts the same range of discretion as district courts have within the Ninth Circuit. *See, e.g., Advanced Estimating System, Inc. v. Riney*, 130 F.3d 996, 998 (11th Cir. 1997) (holding misunderstanding of the law cannot constitute excusable neglect). The discretionary standards outlined in *Pincay* and *Pioneer* will be applied to IXYS's motion.

9. The Supreme Court set forth four factors for a District Court to consider when evaluating a motion based on "excusable neglect": (1) the danger of prejudice to the non-moving party, (2) the length of delay, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the moving party acted in good faith. *Pioneer*, 507 U.S. at

395, 113 S. Ct. at 1498. The Ninth Circuit has held that evaluation of excusable neglect requires that "the weighing of *Pioneer's* equitable factors [be left] to the discretion of the district court in every case." *Pincay*, 389 F.3d at 860. Accordingly, this Court has considered and weighed the four *Pioneer* factors in its evaluation of IXYS's motion.

10. IXYS argues that Factor 1, danger of prejudice, weighs in its favor because IXYS claims it has "behaved in every particular like an appealing party" and so IR should have known of IXYS's intent to appeal. (Motion, p. 3.) IXYS's argument overlooks the obvious point, however, that an appealing party is required above all else to timely file a notice of appeal, which of course IXYS failed to do. For its part, IR argues that the two-plus months of delay from when IXYS could have filed its notice of appeal (mid-September) to when this motion will be heard (late November) are likely to be material and prejudicial because the '699 patent expires in September 2007. While it is true that this delay has increased the likelihood that any appeal of the Final Judgment will not be concluded prior to the expiration of the '699 patent, it is difficult to quantify the degree of this change. Moreover, even assuming IXYS's failure to file a timely notice will delay the outcome of any appeal past the expiration of the '699 patent, any resulting prejudice to IR would hinge on the Federal Circuit's staying the permanent injunction pending the disposition of the appeal. Such interim relief is not justified in this case, however, for the reasons discussed in the November 21, 2006 Order Denying Defendant

Appendix C

IXYS Corporation's "Motion To Stay Execution Of Judgment And Enforcement Of Injunction Pending Appeal." For these reasons, the Court concludes that while IXYS's failure to timely file its notice of appeal has created only a modest risk of prejudice to IR, this factor does not favor IXYS.

11. IXYS also makes the related argument that its post-judgment motion to stay constitutes a constructive notice of appeal. (Motion, p. 3 & n.3)[1] The cases cited by IXYS do not involve Rule 4(a)(5) motions or even excusable neglect, but stand for a different principle — that a timely filed document (usually filed by an *pro se* individual) not in the precise form of a notice of appeal may nevertheless serve as a notice of appeal. Indeed, in *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1232 (9th Cir. 1989), the Ninth Circuit rejected the argument IXYS now makes and specifically refused to construe a

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1. This argument cannot extend to IXYS 's untimely notice of appeal or the parties' January 2006 stipulation or other documents filed prior to the Final Judgment, as the document argued to substitute for the notice of appeal must be filed within the time period in which to notice an appeal. *Helstoski v. Meanor*, 442 U.S. 500, 508 n.4, 99 S. Ct. 2445, 2449 n.4, 61 L. Ed. 2d 30 (1979); *Rabin v. Cohen*, 570 F.2d 864, 866 (9th Cir. 1978) ("documents which are not denominated notices of appeal will be so treated when they serve the essential purpose of showing that the party intended to appeal, are served upon the other parties to the litigation, and are filed in court within the time period otherwise provided by Rule 4(a)" ; *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 618 (9th Cir. 1993) ("Terabyte filed its opening brief on June 18, 1992, well within the time limit for filing a notice of appeal pertaining to the fee award").

motion to stay as a notice of appeal. The *Hollywood* holding is consistent the principle that constructive notice is typically reserved for *pro se* litigants, a situation where life or liberty is at stake or when the interests of substantial justice so requires. *See Munden v. Ultra-Alaska Assoc.*, 849 F.2d 383, 387-88 (9th Cir. 1988) (dismissing appeal on grounds "[w]e will not extend any leniency that is not demanded by these cases to one where the party is represented by an attorney").

12. Also, the cases cited by IXYS involve the filing of briefs, letters, stipulations or other notices and not the filing of a post-judgment motion, and those courts recognized a limited exception for well meaning, but misinformed litigants, such as a *pro se* inmate who thinks he has effectively appealed his conviction by writing a letter to the court. Here, however, even IXYS did not construe its motion to stay as a notice of appeal – it understood the difference and claims it always intended to file the required notice. Nor did the Court or its personnel construe IXYS's motion for stay as a notice of appeal – for example, the Court's clerk took none of the steps specified in Appellate Rule 3(d) to be taken upon the filing of a notice of appeal.

13. For these reasons, the Court finds that IXYS's motion to stay should not be given the effect of a timely notice of appeal.

14. Regarding Factor 2, the length of the delay, the law affords parties wishing to appeal 30 days in which to file their notices of appeal. IXYS did not file its Notice

of Appeal until October 30, 2006 and did not file a "Corrected" Notice of Appeal until November 1, 2006 — 46 and 48 days respectively after the entry of the September 14, 2006 Final Judgment. IXYS asserts that it always intended to appeal, so there was no need for extensive (or, indeed, any) consultations between counsel and client. Nor was the drafting of the notice burdensome or time-consuming, as it is essentially a one-paragraph notice that IXYS has filed at least three other times in this case alone. Thus, IXYS took at least 46 days to do what it could have done in a few minutes on the very first day, and what the rules require to be done within no more than 30 days. Similarly, IXYS consumed nearly half of the 30-day period provided for in Rule 4(a)(5)-for-filing its present motion. Thus, IXYS's delay is significant relative to the time periods set forth in the applicable rules. Moreover, as discussed above in connection with the danger of prejudice, this delay is potentially material to IR's ability to receive the benefits of any injunction. For these reasons, the Court finds that IXYS's delay is not *de minimus*.

15. Factor 3 relates to the reason for the delay. IXYS's sole reason for not filing the notice was that the secretary for the lead counsel had not entered the deadline on counsel's personal calendar and the secretary did not notice the oversight when she became distracted by health issues as the 30-day deadline approached.

16. The secretary to whom IXYS had delegated the responsibility of keeping track of the deadline was in

place doing her regular work on September 14, when she received the Court's notice of entry of Final Judgment, yet she failed to calendar the deadline to appeal from the Final Judgment even though she did calendar the deadline for seeking a stay of the Final Judgment. IXYS claims this omission was excusable because she was preoccupied with the filing two weeks later of that motion to stay. This is not persuasive; a legal secretary with 21 years of experience should be able to calendar two known deadlines driven from the same judgment, particularly as she had two weeks to do so while the stay motion was being drafted by counsel. *See U.S. v. Mitchell,* 464 F.3d 1149, 1152 (10th Cir. 2006).

17. Moreover, the secretary still did not turn to the appeal deadline even after the motion to stay was filed on September 28. At the earliest, she did not become distracted with health issues until October 4 (20 days after Final Judgment was entered) when her doctor cautioned her that a routine mammogram was not clear, and possibly not until October 11 (28 days after IXYS received notice of the final judgment and five days before the deadline for filing the notice of appeal) when she received the diagnosis. IXYS offers no explanation for why it failed to file (or calendar the filing of) the required notice of appeal during the intervening seven or 14 days. Even had the secretary's health issues been entirely debilitating instead of merely being distracting during this time period, it would not explain the failure to act before becoming aware of them. *See Gibbons v. U.S.*, 317 F.3d 852, 855 (8th Cir. 2003) ("the fact that counsel

became ill does not excuse the period of time she was not ill"); *Meza v. Washington State Dep't of Soc. and Health Servs.*, 683 F.2d 314, 316 (9th Cir. 1982) ("Even if [counsel's] wife's hospitalization prevented the performance of all his duties, he already had let 28 days pass without action"); *Baker v. Raulie*, 879 F.2d 1396, 1399-1400 (6th Cir. 1989) (no excusable neglect where appellant's "proffered reason does not address the obvious question of what happened between the district court's entry of judgment on August 3 and the beginning of his attorney's other trial on August 22").

18. Additionally, there is no evidence in the record to suggest that the secretary was *physically* absent, incapacitated or otherwise unable to perform her job duties at any time during the 30-day appeal period. Indeed, IXYS's counsel has declared that he was unaware of any health issue until after the deadline had been missed. (Supplemental Declaration of Roger L. Cook, dated November 13, 2006, ¶ 2.) Such distractions are entitled to "little weight." *Pioneer*, 507 U.S. at 398, 113 S. Ct. at 1499.

19. Attorneys have a duty of diligence towards their clients, and the District Court is in the best position to evaluate "whether the lawyer has otherwise been diligent" notwithstanding the missed deadline. *Pincay*, 389 F.3d at 859. *See also Dávila-Álvarez*, 257 F.3d at 65 ("a lawyer's duty of diligence transcends both upheaval at work and personal tragedy"); *U.S. ex rel McAllan v. New York*, 248 F.3d 48, 53 (2d Cir. 2001) (holding parties have an obligation to monitor docket sheets to inform

themselves of the entry of orders they wish to appeal). During the six years that this case has been pending, IXYS was well represented by numerous attorneys from a reputable law firm, Townsend and Townsend and Crew LLP ("Townsend"). Townsend employs a docketing department which calendars deadlines and then every Friday distributes a master litigation report showing these deadlines. IXYS admits that its deadline for filing its notice of appeal was properly calendared and was shown on the report for four consecutive weekly reports prior to the October 16 filing deadline, but that none of its attorneys looked at the report. IXYS offers no justification for why its lead counsel failed to monitor the weekly calendar report, where the filing deadline was correctly noted, and failed to notice that the appeal deadline was not on his personal calendar.

20. IXYS similarly offers no justification for why its other attorneys also failed to monitor the weekly calendar report, where the filing deadline was correctly noted, other than to assert that only one of those attorneys had responsibility for keeping track of the deadline. This explanation is not fully satisfactory. *See Gibbons,* 317 F.3d at 855 (holding solo practitioner who became ill failed to "take appropriate measures for the administration of her cases upon her return and realization that her illness would preclude her from personally attending to them"); *Harold Washington Party v. Cook County, Ill. Democratic Party,* 984 F.2d 875, 879-80 (7th Cir. 1993) (affirming finding of no excusable neglect where district judge noted that "while the lead counsel might have been unable to respond,

the other three attorneys who appeared for the Plaintiffs had wholly failed to explain their failure" to respond); *Meza*, 683 F.2d at 315 (the state's failure to timely notice its appeal was not excusable neglect where the lead counsel had failed to explain why other members of his office could not have performed the "largely clerical" task of preparing the notice, a one-paragraph document).

21. IXYS's counsel were actively working on this case during the 30-day time period for filing a notice of appeal – in particular, during the two weeks between entry of the Final Judgment on September 14 and IXYS's filing of its motion to stay on September 28. A notice of appeal is a simple, one-paragraph document that IXYS could easily have filed before or concurrently with its motion to stay. *See Baker*, 879 F.2d at 1400. IXYS has advanced no reason why it decided to wait to file its notice of appeal, instead of filing the required documents as soon as it received notice of entry of the Final Judgment on September 14.

22. This Court finds that it would set a bad precedent if the standard for finding excusable neglect was that the staff person responsible for keeping track of deadlines was distracted, regardless of whether the distraction was understandable or not. The reason for the delay was entirely within IXYS's control and of its own making. In *Pioneer*, the Supreme Court did not say that any reason for the delay would be excusable and in fact rejected the first proffered excuse (upheaval in counsel's law practice) as carrying "little weight."

507 U.S. at 398, 113 S. Ct. at 1499. The Supreme Court also expressly noted that "inadvertence . . . do[es] not usually constitute 'excusable' neglect." *Pioneer*, 507 U.S. at 392, 113 S. Ct. at 1496.

23. This Court has reviewed the Ninth Circuit's decisions in *Pincay* and *Marx v. Loral Corp.*, 87 F.3d 1049 (9th Cir. 1996), and finds that they do not compel a finding of excusable neglect. Those cases held that mistakes in calendaring were not *per se* inexcusable, and that a District Court should evaluate each case on an individual basis in consideration of the four *Pioneer* factors. In neither opinion did the Ninth Circuit hold or even suggest that a calendaring mistake must constitute excusable neglect. To the contrary, the Ninth Circuit indicated that it would have affirmed had those District Courts denied the motions to extend time. In *Pincay*, the Ninth Circuit expressly noted that it "would be hard pressed to find any rationale requiring us to reverse" if the district court had made the opposite ruling. *Pincay*, 389 F.3d at 859. Similarly, in *Marx*, the Ninth Circuit affirmed because "[t]he district court's analysis of the *Pioneer Inv.* factors in this case, although considerably lenient to the plaintiffs, was not a clear error of judgment." 87 F.3d at 1054.

24. Moreover, the facts of this case less favorable to the movant than were those in *Pincay* and *Marx*. In *Pincay*, the attorney delegated the calendaring task to an experienced paralegal, confirmed that the deadline had been calendared, and then arranged to have the notice filed five days before the deadline. *Pincay v.*

Andrews, 351 F.3d 947, 949 (9th Cir. 2003), *rev'd*, 389 F.3d 853 (9th Cir. 2004) (*en banc*). Here, IXYS's counsel did none of these things. The many Townsend attorneys staffed on this case made no effort to ensure that the appeal deadline had been properly calendared and indeed appear to have ignored the issue entirely; certainly no effort was made to file the notice five days or any other time in advance of the deadline.

25. The *Marx* case is even less supportive of IXYS's position. In that case, the District Court found excusable neglect based on a calendaring error *and* because plaintiff's counsel had difficulties in arranging a meeting with the class of plaintiffs represented to determine whether or not to appeal at all. Although the Ninth Circuit agreed with defendants that it suspected the calendaring error to be the real cause of the missed deadline, it nevertheless affirmed because the broader finding of fact was within the province of the District Court. *Marx*, 87 F.3d at 1054. As noted by the Ninth Circuit in its initial opinion in *Pincay*, the *Marx* District Court's reliance on the difficulty of consulting with the class members was determinative in the Ninth Circuit's decision to affirm:

> In *Marx v. Loral Corp.*, 87 F.3d 1049 (9th Cir. 1996), we considered excusable neglect under Fed. R.App. P. 4(a)(5). The district court found excusable neglect in plaintiffs' counsel encountering difficulties in arranging a meeting with the class of plaintiffs they represented. The appeal had been filed one

> day late. The appellees argued "somewhat persuasively" that the delay was due solely "to the attorney's calendaring miscalculation." *Id.* at 1054. We did not decide what caused the delay but simply stated that "this court cannot reverse the district court's ruling unless it has a definite and firm conviction that the lower court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Id.* at 1054. As we were in doubt, and not definitely and firmly convinced of the calendaring error, we affirmed the district court."

Pincay, 351 F.3d at 950, *rev'd on other grounds*, 389 F.3d 853 (9th Cir. 2004) (*en banc*). Here, in contrast, the deadline was properly calendared on Townsend's calendar system, and there was no need to consult with the client concerning whether or not to appeal. IXYS could have filed its notice of appeal on September 15, but for reasons never explained chose to wait and ultimately missed a clearly calendared deadline.

26. Accordingly, this Court finds that IXYS's decision to delay filing its appeal was at least in part strategic rather than merely neglectful. *See In re Mahoney Hawkes, L.L.P.*, 272 B.R. 19, 20 (1st Cir. 2002); *Penrod Drilling Co. v. U.S.*, 925 F.2d 406 (Fed. Cir. 1991); *Certain Underwriters at Lloyds v. Inlet Fisheries, Inc.*, 232 F.R.D. 609, 611 (D. Alaska 2005).

27. For all of the foregoing reasons, the Court finds that Factor 3 weighs heavily in favor of IR.

28. This Court next considers Factor 4, whether the movant acted in good faith, and finds that this factor weighs narrowly in favor of IR. In choosing to delay filing its notice of appeal, IXYS took a calculated risk that something would happen to interfere with that intended last-minute filing. While such a risky course of conduct may not be bad faith, it likewise fails to evidence the complete good faith that ought to be required of those seeking relief from the Court. *See Certain Underwriters at Lloyds*, 232 F.R.D. at 611 (noting that "the absence of bad faith" was not tantamount to good faith where party's neglect was due to its delay and ignoring its responsibilities under the rules); *In re Mahoney Hawkes, L.L.P.*, 272 B.R. at 20 (affirming denial of extension where party knew of filing deadline but deliberately withheld filing because the "tardiness was borne of calculation rather than neglect"); *Penrod Drilling Co.*, 925 F.2d at 408 ("By electing to serve the motion to rehear upon the government by ordinary mail, Penrod assumed the risk that the motion would not be timely received").

29. Having considered all of the above, this Court has weighed the four *Pioneer* factors and finds that IXYS's motion should be, and, therefore, hereby is, DENIED.

Appendix C

Dated: DEC 6 2006

s/ MANUEL L. REAL
United States District Court Judge

Submitted by:

WHITE & CASE LLP

VINSON & ELKINS L.L.P.

By: s/ Glenn W. Trost
Glenn W. Trost
Attorneys for International Rectifier Corporation

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC FILED APRIL 4, 2008

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2007-1063, -1141, -1165

(DCT - 00-CV-6756)

INTERNATIONAL RECTIFIER

V

IXYS CORP.

ORDER

A petition for rehearing en banc having been filed by the Cross-Appellant, and a response thereto having been invited by the court and filed by the Appellant, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

Appendix D

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on April 11, 2008.

FOR THE COURT,

s/ Jan Horbaly/JB
Jan Horbaly
Clerk

Dated: 04/04/2008

APPENDIX E — STATUTE AND RULES INVOLVED

§ 2107. Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause.

* * * *

Appendix E

Rule 3. Appeal as of Right—How Taken

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

* * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

* * *

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

* * * *

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

* * *

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

* * *

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

* * *

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

* * * *